

No. 2425.

In the

**United States
Circuit Court of Appeals
For the Ninth Circuit**

Farmers' and Merchants'
Bank, Phoenix, as Intervener,
Appellant

vs.

Arizona Mutual Savings and
Loan Association and Arizona
Trust Company and Sims Ely,
as Receiver for the Arizona
Mutual Savings and Loan As-
sociation and Arizona Trust
Company, and the Intervening
Petitioners who were allowed
to intervene in the cause en-
titled Charles W. Clark, Com-
plainant, vs. Arizona Mutual
Savings and Loan Association
and Arizona Trust Company,
Defendants, in the Court be-
low, by the Decree of March
12, 1914.

Appellees

B R I E F O F A P P E L L E E S ,
J. L. WARING, C. T. WISE, et al.

R. E. MORRISON
J. E. MORRISON,
BENTON DICK,
O. T. RICHEY,

Solicitors for Appellees,
Fleming Building,
Phoenix, Arizona

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Brief of Appellees
J. L. Waring,
C. T. Wise, et al.

On appeal from the United States District Court
for the District of Arizona.

This is an appeal by the Farmers' and Mer-
chants' Bank of Phoenix, from a decree and an order
of the United States District Court for the District
of Arizona, of date March 12, 1914.

The facts, so far as the record filed in these pro-
ceedings discloses, and so far as furnished by appel-

lant, and upon which this appeal is based, are fairly stated in the brief of appellant, and to that extent only would seem to fully inform the Court.

To appellees it would appear that there are no sufficient facts before this Court by which it may be properly informed in these premises so as to justify it in coming to a conclusion and determination upon the issue of whether the decree of March 12, 1914, is a nullity, for the reason that this Court must necessarily first determine whether the decree of February 27, 1913, is one given and rendered within the power, authority and jurisdiction of the court below. And before this Court may come to any conclusion or determination as to whether the decree of February 27, 1913, is or is not a decree within the power, authority and jurisdiction of the court below, it seems to the appellees this court must have, for its consideration in that respect, the whole record of the action out of which this appeal grew.

As an illustration of this contention appellees respectfully call the attention of this Court to portions of the pleadings in the action prior to the giving of the decree of February 27, 1913, to-wit:

"That the transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of all of the assets of the defendant Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed and that an

accounting between both of the defendants above named be had and taken, and that an accounting between the defendant Loan Association and your Orator and other stockholders similarly situated be ordered and decreed.

And that, inasmuch as the said defendant Loan Association has been since April 11, 1911, and now is insolvent, as aforesaid that a receiver be appointed with authority to reduce to possession all of the assets of the said defendant Loan Association wheresoever found or situated, and that the court appoint a master to take proof of the facts alleged in this, your Orator's, bill and to determine the rights and equities of your said Orator, and all of the parties concerned herein. And that the affairs of the said defendant Loan Association be wound up, its assets marshaled as aforesaid, and distributed to those found to be entitled thereto."

The foregoing being the most essential portion of the prayer of the complaint of Clark in the original action, and adopted by those persons intervening prior to the decree of February 27, 1913, and is based upon the pleadings entirely consistent therewith.

Clark filed his action for himself and "others similarly situated." There would seem to be but one meaning or construction to be placed or attached to the expression "others similarly situated" in the original action, and that is, that that expression included

and was intended to mean and include all of those persons who were "similarly situated" at the time of the illegal transfer of the assets of the Arizona Mutual Savings and Loan Association (hereinafter referred to as the Loan Association) by it to the Arizona Trust Company (hereinafter referred to as the Trust Company) and in respect to their several interests and title in and to those assets, and *not* restricted to those who were, *at the time of the filing of his complaint*, "similarly situated," in respect to his relative situation thereto at that time.

Both decrees, one directly and the other in effect, determine the transfer by the Loan Association of its assets to the Trust Company, to have been fraudulent and illegal. The decree of February 27, 1913, held the transaction "unlawful and invalid and not binding" only as to "the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association," while the decree of March 12, 1914, held the "transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution."

The transaction being, in law and upon the facts, illegal and fraudulent, the rights of the stockholders in the Loan Association at the time of such transfer were never disturbed and followed the property wheresoever it might go. Some of the stockholders of the Loan Association, believing in the representa-

tions made to them by the officers of both Loan Association and the Trust Company, in order to follow the property, exchanged their stock in the Loan Association for stock in the Trust Company, where the title was by them supposed to rest. Others of the stockholders did not exchange their stock, but held their original status with the Loan Association. Those exchanging stockholders intervening prior to the decree of February 27, 1913, are in no better position, so far as their interest in the transferred property is concerned, than those who did not intervene until under the decree of March 12, 1914, or who have not intervened at all, for the reason that the interests of all thereof remained the same throughout, the whole scheme and all of the transactions entered into looking toward carrying the same to a consummation being void and illegal for fraud.

While the foregoing is but a most brief resume of what was pleaded, prayed for and done, it will serve to evidence to this Court the absolute necessity of its having before it the full record of the whole action in the court below before it will be able to arrive at an intelligent determination of whether the decree of February 27, 1913, was given and rendered in excess of the power, authority and jurisdiction of the court rendering it, and as this Court must first determine this point before it may determine whether the decree of March 12, 1914, is a nullity, it must necessarily have before it the full record of the action before the court below.

Such record is not before this Court in this appeal, and, therefore, appellees respectfully submit that this appeal should be dismissed for insufficient facts before it upon which to reverse or affirm the decree of March 12, 1914, or the order of court of that date.

No part of the record of the action before the court below prior to the decree of February 27, 1913, is before this Court in this appeal, and, therefore, this Court is wholly uninformed in this appeal of any facts upon which it may base any finding whatever as to whether the decree of February 27, 1913, is rendered in excess of the power, authority and jurisdiction of the court rendering it, and hence unable to base any finding as to whether the decree and order of March 12, 1914, are nullities, and this appeal should be dismissed therefore.

If this Court finds sufficient facts are before it in this appeal to come to a determination of whether the decree and order of March 12, 1914, are nullities, then, and in that event, appellees respectfully adopt the authorities and arguments as contained in the brief filed in this Court in support of Respondent's return and response to the Motion for leave to file Petition for Writ of Mandamus and for Order to Show Cause, In the Matter of the Application of John Dennett, Jr., et al., for a Writ of Mandamus, directed to the Honorable William H. Sawtelle, District Judge of the United States District Court for the District of Arizona, and directed to said District Court, as the authorities and arguments of these appellees for the

purpose of answering and meeting the contentions of appellant herein, and in support of contentions of appellees that the decree and order of the United States District Court for the District of Arizona, of date March 12, 1914, and from which this appeal is taken, are valid and properly within the power, authority and jurisdiction of said court last named to make and give, and such adoption aforesaid is so made to the same effect and extent as if appellees had made and set forth herein the said authorities and arguments.

Appellees think, in any event, that there are no sufficient facts apparent in the record, or at all, justifying this Court in reversing the decree and order of March 12, 1914, the facts in the record of the action in the court below showing conclusively that the decree of March 12, 1914, is consistently and completely in accordance with the pleas and prayers of each and every one of the litigants in the action from its inception to the giving and rendering of the decree last aforesaid.

Appellees respectfully submit that the decree and order of March 12, 1914, should stand, that this appeal should be dismissed, and that appellees have their costs herein.

Respectfully submitted,

R. E. MORRISON,
J. E. MORRISON,
BENTON DICK,
O. T. RICHEY.

Solicitors for Appellees

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